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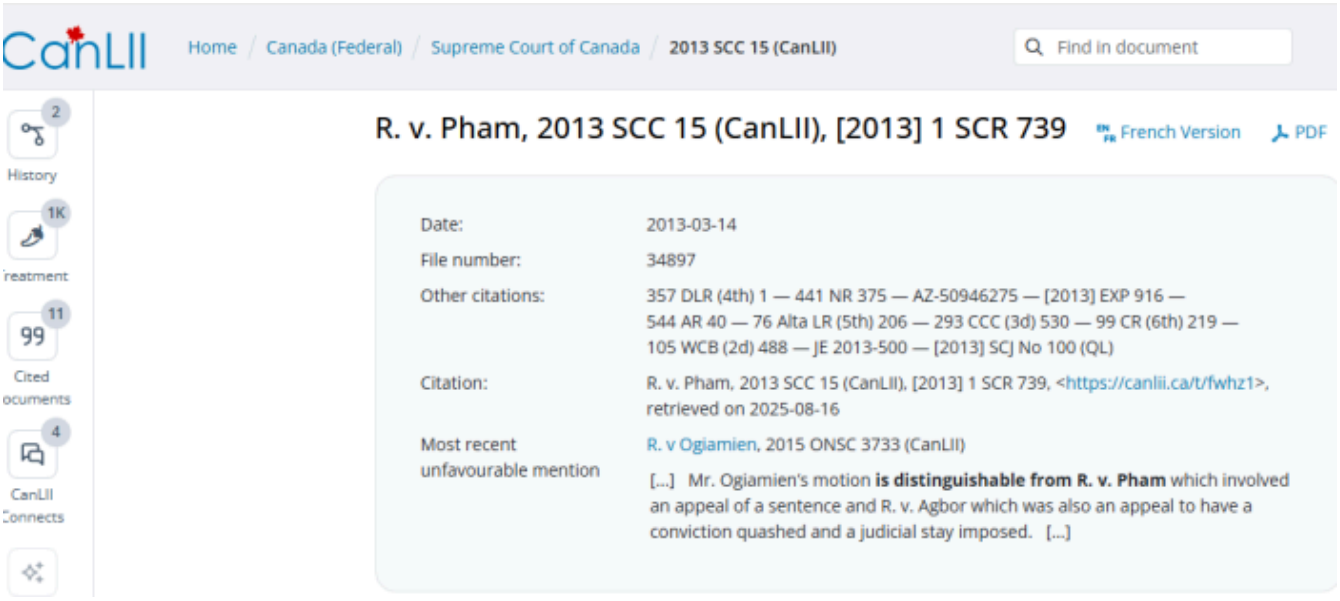
The Pham Case: NGOs Pushed For Foreign Criminals Having More Rights Than Canadians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R. v. Pham, 2013 SCC 15 (CanLII), [2013] 1 SCR 739
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Citation: R. v. Pham, 2013 SCC 15 (CanLII), [2013] 1 SCR 739, <https://canlii.ca/t/fwhz1>, retrieved on 2025-08-16
Most recent unfavourable mention
R. v Ogiamien, 2015 ONSC 3733 (CanLII)
[...] Mr. Ogiamien's motion is distinguishable from R. v. Pham which involved an appeal of a sentence and R. v. Agbor which was also an appeal to have a conviction quashed and a judicial stay imposed. [...]

A disturbing trend has been in the news lately. Recently, a series of cases were published where foreigners received unusually low sentences for criminal convictions, in order to avoid deportation. Since the 2013 Supreme Court ruling in Pham, there has been a requirement to view “immigration consequences” when handing down punishment.

What’s even more unsettling is how this came to happen. A foreign drug trafficker received a 2 year sentence on a Joint Submission (agreement), but seemed to have realized after the fact that it would mean deportation.

For context: under the rules at the time, non-citizens who received a jail sentence of 2 years (or more) were excluded from many appeal options to avoid deportation. Removal was pretty much automatic. However, those convicted and receiving lesser punishment still had more prospects of staying. This was later reduced to a 6 month limit.

Hoang Anh Pham was sentenced to 2 years in prison for drug possession, for the purposes of trafficking. On Appeal, he asked that it be reduced by a day, to avoid deportation. The Court of Appeal, in a split decision, rejected it. However, the Supreme Court of Canada granted Leave (permission) to hear the case, and then did allow it.

What likely tipped the scales was that several Intervenors (interested parties) made submissions to the Supreme Court of Canada. These were:

- British Columbia Civil Liberties Association (Charity Page)
- Canadian Association of Refugee Lawyers
- Canadian Civil Liberties Association (Charity Page)

- Canadian Council for Refugees (Charity Page)
- Criminal Lawyers' Association of Ontario

Various groups weighed in, asking the the Supreme Court require that Judges take immigration consequences into account when imposing sentences. How does this benefit actual Canadians? How does special consideration for foreign criminals create a better society?

Hoang Anh Pham Previously Convicted For Drug Trafficking

> [2] The facts as disclosed at trial were that ***the appellant was involved in a three-stage marijuana grow operation consisting of 591 plants at various stages of growth***. It was estimated that the value of this crop ranged from ***$461,718 (if sold by the pound) to $738,750 (if sold by the ounce). An additional 28 grams of marijuana was found in two freezer bags*** in the freezer compartment to the refrigerator on the main floor.

> [3] At the subsequent sentencing hearing, the ***appellant's prior criminal record was entered*** as an exhibit. It disclosed that on December 12, 2000 the appellant had been convicted of one count of failing to attend court (section 145(2)(a) of the Criminal Code), ***one count of trafficking in a scheduled substance (section 5(1) of the CDSA) and one charge of possession of a scheduled substance for the purpose of trafficking (section 5(2) of the CDSA)***. At that time, the appellant had received a sentence of one day in gaol on the first count and a three month conditional sentence order, concurrent, on each of the other two charges.

> [4] At the sentencing hearing in this case, the appellant's then counsel and Crown counsel urged upon the sentencing judge, by way of joint submission, a sentence of imprisonment for two years. ***The Crown cited as aggravating factors that the appellant had benefitted financially and that he had not learned his lesson*** from his previous encounter with the criminal justice system.

From the Alberta Court of Appeal, we can see that Pham was already a convicted drug trafficker when this sentence was handed down.

Prosecutors Complicit With Sentence Reduction

> [32] Returning to the case at bar, the ***appellant has previously been convicted of three offences. In 2000, he was convicted of failing to attend court, trafficking in a scheduled substance, and possession of a scheduled substance for the purposing of trafficking***. For the first offence, he was sentenced to one day in jail; he received a three month conditional sentence for the other two charges. Now there is the more recent drug-related conviction, which resulted in the two year prison term he asks us to reduce. Illegal drugs are a tremendous scourge on our society. The appellant's repeated contribution to the problem, albeit modest in the large scale of things, would normally disqualify him from leniency. However, ***as the prosecution has consented to this appeal***, I would agree to allow it with the caveat that in future cases, this relief will not be there simply for the asking.

In a dissenting opinion with the ABCA, Justice Martin mentioned that the prosecution had consented to the appeal, which would have reduced the sentence. So, even though he was argued that he "clearly hadn't learned his lesson", the Crown is still okay with reducing the sentence to help prevent deportation.

1. B.C. Civil Liberties Association

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION — Quick View

Charity's detail page

Registration no.:	888466844 RR 0001
Status:	Registered
Effective date of status:	1979-01-01
Type of qualified donee:	Charity
Designation:	Charitable organization
Website:	WWW.BCCLA.ORG

2. The BCCLA submits that ***failure to consider the immigration consequences of a sentence would deprive the court of information required to properly consider the relevant sentencing factors***, and may result in a sentence which ***unjustly infringes an offender's rights and freedoms***.

3. ***Immigration consequences must be taken into account by a sentencing judge in order to ensure that the offender is not punished more than necessary***. A permanent resident convicted in Canada and sentenced to two years or more is almost certain to face deportation. For many permanent residents, deportation will be the most punitive impact of their sentence. In order to ensure that sentences are consistent with the principles of proportionality and restraint, the ***BCCLA submits that immigration consequences are relevant personal circumstances which should be taken into account as part of the individualized sentencing assessment***.

2. Canadian Council For Refugees

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CANADIAN COUNCIL FOR REFUGEES/CONSEIL CANADIEN POUR LES RÉFUGIÉS — Quick View

Charity's detail page

Registration no.:	118830470 RR 0001
Status:	Registered
Effective date of status:	1986-09-01
Type of qualified donee:	Charity
Designation:	Charitable organization
Website:	CCRWEB.CA

4. Given that a non-citizen who has been convicted of a criminal offence may face removal from Canada, it is the ***CCR's submission that the judge imposing the sentence must take into account the impact that the sentence will have on the availability of remedies for the retention of status in Canada***. This is based on the following reasoning:

9. Non-citizens whose human rights will be infringed by removal ***are entitled to have their interests considered by a competent, independent and impartial decision maker prior to removal***. A scheme was created for consideration of such interests under the Immigration and Refugee Protection Act (IRPA). Relevant to this appeal, this ***obligation is met in the equitable appeal which is available to permanent residents and Convention refugees who face removal because of a criminal conviction*** but who have received a sentence of less than two years.

17. It is submitted therefore that a judge, exercising a judicial discretion in relation to the imposition of an appropriate sentence for a crime committed, ***ought to take into account the impact that the sentence will have on the availability to a non-citizen of a hearing which is fully in compliance with the principles of fundamental justice under s. 7 of the Charter*** in relation to that person's status in Canada.

Of course, these aren't anywhere near all of the filed documents. However, they do illustrate what the main concerns being raised are.

The Supreme Court also has the video of the hearing posted on its website, even years later. It's worth a watch.

51:30: Canadian Association of Refugee Lawyers begins, and brings up the possible ineffective assistance of counsel argument.
1:02:00: Criminal Lawyers Association of Ontario begins.
1:08:00: British Columbia Civil Liberties Association begins.
1:13:41: Canadian Council for Refugees begins.
1:19:15: Canadian Civil Liberties Association begins.
1:38:30: Respondent (Government) begins.

While the Government (initially) asked that the case be remitted back to the Court of Appeal, at the hearing, they simply consented to the Appeal being allowed.

This should make Canadians' blood boil. Registered "charities" are getting significant tax breaks while they try to implement caselaw to give preferential treatment to foreign criminals.

Conservative Bill A Trojan Horse?

At the risk of jumping to conclusions, consider a recent video from Michelle Rempel-Garner. She proposes a Private Member's Bill to amended the Criminal Code. In her words, Judges "should not" be able to take immigration status into account. It's at the 2:00 mark.

Should not?

How about cannot? Or must not? Or are prohibited from?

While this may come across as pedantic, this choice of wording would allow Judges to retain discretion as to whether or not they consider immigration status. There would merely be a recommendation against doing so, not an outright ban.

Does she not realize that every lawyer with a foreign convicted criminal for a client will be arguing that their case is exceptional?

We'll have to see what happens.

COURT RULINGS:
(1) https://www.canlii.org/en/ab/abca/doc/2012/2012abca203/2012abca203.html
(2) https://www.canlii.org/en/ca/scc-l/doc/2012/2012canlii68768/2012canlii68768.html
(3) https://www.canlii.org/en/ca/scc/doc/2013/2013scc15/2013scc15.html

SUPREME COURT OF CANADA:
(1) https://www.scc-csc.ca/cases-dossiers/search-recherche/34897/
(2) Pham Factum Appellants Factum
(3) Pham Factum Respondents
(4) Pham Factum Appellants Reply
(5) Pham Factum BC Civil Liberties Association
(6) Pham Factum Canadian Association Of Refugee Lawyers
(7) Pham Factum Canadian Civil Liberties Association
(8) Pham Factum Canadian Council For Refugees
(9) Pham Factum Criminal Lawyers Association Of Ontario

CANADIAN DECISIONS, IMMIGRATION (CANADA), LAWFARE, LOBBYING, NGO/CS, PROCEDURAL, SUBVERSION